No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether all pre-viability prohibitions on elective abortion are unconstitutional.

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INTEREST OF THE UNITED STATES

This Court granted review to decide whether Mississippi's prohibition on pre-viability abortion violates the Fourteenth Amendment. In defending that law, petitioners ask the Court to overrule its precedents recognizing a woman's right to choose whether to terminate a pregnancy before viability. The United States has a substantial interest in the proper interpretation of the Fourteenth Amendment and principles of *stare decisis*. The United States has also participated in past cases involving related issues. See, *e.g.*, *June Medical Servs. L. L. C.* v. *Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992).

STATEMENT

1. In 2018, Mississippi enacted the Gestational Age Act (the Act), Miss. Code Ann. § 41-41-191, which prohibits abortion after 15 weeks' gestation. Pet. App. 2a.[1] The Act includes two narrow exceptions: (1) where abortion is necessary to "preserve the life of a pregnant woman" or prevent "a serious risk of substantial and irreversible impairment of a major bodily function," and (2) where the fetus has a condition that is "incompatible with life outside the womb." Miss. Code Ann. § 41-41-191(3)(h)-(j); see *id.* (4)(a) and (b). The Act does not include exceptions for other medical complications, or for rape or incest. Preexisting Mississippi law, not at issue here, prohibits abortion after 20 weeks. *Id.* § 41-41-137.

2. Respondent Jackson Women's Health Organization (JWHO) is the only abortion provider in Mississippi. Pet. App. 41a. JWHO performs abortions up to 16 weeks' gestation. *Id.* at 45a.

On the day the Act was signed into law, JWHO and one of its doctors brought this suit challenging the Act's constitutionality. Pet. App. 41a-42a. The district court permanently enjoined the Act's enforcement. *Id.* at 40a-55a. The court explained that "for more than forty years, it has been settled constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion." *Id.* at 43a (citation omitted). The court observed that in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), this Court reaffirmed "the central holding" of *Roe* v. *Wade*, 410 U.S. 113 (1973): "Before viability," the State's legitimate interests in fetal life, women's health,

[1] The Act measures gestation from a woman's last menstrual cycle, Miss. Code Ann. § 41-41-137(3)(e), which is approximately two weeks before conception, see Pet. App. 41a n.1.

and other related matters "are not strong enough to support a prohibition of abortion." Pet. App. 43a (quoting *Casey*, 505 U.S. at 846).

The district court then held that the "undisputed" facts establish that the Act conflicts with that central holding. Pet. App. 44a-45a. The court explained that "established medical consensus" places viability at 23 to 24 weeks, and that the State had been "'unable to identify any medical research or data that shows a fetus has reached the "point of viability" at 15 weeks.'" *Id.* at 44a-45a (citation omitted). The court thus held that "the Act is unlawful" because it prohibits abortion before viability. *Id.* at 45a. The court also rejected petitioners' characterization of the Act as a mere "regulation" subject to *Casey*'s undue-burden standard, because "'the state is *forbidding* certain women from choosing pre-viability abortions rather than specifying the conditions under which such abortions are to be allowed.'" *Id.* at 47a-48a (citation omitted).

3. The court of appeals affirmed. Pet. App. 1a-19a. It explained that "[i]n an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and reaffirmed) a woman's right to choose an abortion before viability." *Id.* at 1a-2a. Like the district court, the court of appeals determined that the Act "is a prohibition on pre-viability abortion," not "a mere regulation." *Id.* at 10a, 12a. Judge Ho concurred in the judgment because "decades of Supreme Court precedent mandate[d]" affirmance. *Id.* at 37a.

SUMMARY OF ARGUMENT

After seeking certiorari on other grounds, petitioners now ask this Court to overrule the half-century of precedent recognizing that the Constitution protects a woman's right to decide whether to terminate her

pregnancy before viability. Petitioners insist that a woman's decision whether to carry a pregnancy to term—perhaps the most intensely personal and life-altering choice a person can make—should enjoy no more protection than workaday social and economic matters that trigger rational-basis review. If the Court considers that new argument, it should decline to disturb *Roe*'s central holding—just as it did a generation ago.

A. In *Casey*, the Court exhaustively considered the case for overruling *Roe*, including every argument petitioners make here. In rejecting those arguments, the Court emphasized that *Roe* followed from a long line of precedents affording constitutional protection to the most intimate choices about reproduction and family, as well as bodily integrity. But the Court also held that even if it would have decided *Roe* differently, *stare decisis* required adhering to *Roe*'s central holding. In so doing, the Court cautioned that overruling *Roe* would have caused grave harm to women as well as "profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 869 (1992).

B. *Stare decisis* applies with even greater force today. *Casey*'s application of *stare decisis* principles is itself another layer of binding precedent. *Roe*'s central holding remains clear and workable, and it has only been further reinforced by intervening legal and factual developments. And the passage of another three decades means that every American woman of reproductive age has grown up against the backdrop of the right secured by *Roe* and *Casey*, which has become even more deeply woven into the Nation's social fabric.

C. *Stare decisis* would require adhering to *Roe* and *Casey* even if the Court now believed they were wrongly

decided. But *Roe* and *Casey* were and are correct. They recognize that forcing a woman to continue a pregnancy against her will is a profound intrusion on her autonomy, her bodily integrity, and her equal standing in society. At the same time, *Roe* and *Casey* recognize that States have important interests, including in protecting women's health and the potentiality of human life. In adopting the viability rule, the Court "struck a balance" that accommodates both sets of interests. *Gonzales* v. *Carhart*, 550 U.S. 124, 146 (2007). The Court should reject petitioners' invitation to upset that careful balance by removing the woman's interests from the scale.

D. For much the same reasons, this Court should also reject petitioners' purportedly more modest alternative arguments for upholding the Act while nominally maintaining some constitutional protection for abortion. Both alternatives would still require the Court to overrule the central holding of *Roe* and *Casey* by rejecting the viability rule. Taking that step would carry all of the *stare decisis* harms identified in *Casey*. And petitioners' terse discussion does not even begin to explain how the Court could answer the questions that would inevitably follow from adopting petitioners' alternative arguments—including whether States could ban abortion after 12, 10, 8, or 6 weeks.

Under principles of *stare decisis*—and because *Roe* and *Casey* were and remain correct—this Court should again reaffirm "the right of a woman to choose to have an abortion before viability." *Casey*, 505 U.S. at 846. And because the Act is flatly inconsistent with that right, the Court should affirm the judgment below.

ARGUMENT

In seeking certiorari, petitioners assured this Court that their arguments would not "require the Court to overturn *Roe* or *Casey*" and mentioned overruling only in the alternative, in a one-sentence footnote. Pet. 5 & n.1. Petitioners have now dramatically changed course, devoting their merits brief to a frontal assault on *Roe* and the fifty years of precedent reaffirming its central holding. The Court has previously declined to indulge such tactics. *E.g.*, *Visa Inc.* v. *Osborn*, 137 S. Ct. 289 (2016). It may wish to do the same here—particularly given the gravity of the issue petitioners have belatedly injected into this case. But if the Court considers that issue, it should once again reaffirm *Roe*'s central holding that the Constitution protects a woman's right to terminate her pregnancy before viability.

A. *Casey* Reaffirmed *Roe*'s Central Holding That A State May Not Prohibit Abortion Before Viability

1. Nearly fifty years ago, this Court held that the Constitution protects "a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). The Court emphasized the profound physical and personal consequences of that decision, and it relied on a long line of precedent recognizing that "the Fourteenth Amendment's concept of personal liberty" protects against government interference with intensely personal decisions "relat[ed] to marriage," "procreation," "contraception," "family relationships," "and child rearing and education." *Id.* at 152-153.

At the same time, *Roe* acknowledged the "important and legitimate" state interests in "preserving and protecting the health of the pregnant woman" and in "protecting the potentiality of human life." 410 U.S. at 162. After carefully assessing those interests, the Court held

that viability marks the earliest point at which they are sufficient to outweigh a woman's right to decide whether to carry her pregnancy to term. *Id.* at 163. Beyond that point, a State "may go so far as to proscribe abortion," except "when it is necessary to preserve the life or health of the mother." *Id.* at 163-164. But before viability, the State's interests cannot justify the grave imposition of compelling a woman to continue a pregnancy against her will. *Ibid.*

In the decade that followed, "the Court repeatedly and consistently * * * accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." *City of Akron* v. *Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983), overruled on other grounds by *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992). And it did so despite repeated requests to overrule *Roe*, emphasizing the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*." *Ibid.*

2. A generation after *Roe*, the Court again considered and squarely rejected calls to overrule it. Instead, after thorough consideration, the Court held in *Casey* that "the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 846 (1992). The Court explained that *Roe*'s essential holding "has three parts." *Ibid.* First, a woman has a right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Ibid.* "Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Ibid.* Second, the State may

"restrict abortions after fetal viability, if the law contains exceptions" for "the woman's life or health." *Ibid.* And third, "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Ibid.*

Casey thus "struck a balance" between a woman's constitutional liberty interests and a State's legitimate regulatory interests that was "central to its holding." *Gonzales* v. *Carhart*, 550 U.S. 124, 146 (2007). States may not prohibit any woman from choosing to terminate a pregnancy before viability, but they may regulate to protect legitimate state interests so long as those regulations do not impose an "undue burden" on the "woman's right to make the ultimate decision." *Casey*, 505 U.S. at 877 (plurality opinion). As *Casey* itself illustrates, that standard affords States significant latitude to regulate abortion. *Id.* at 879-887, 899-901.

3. In reaffirming *Roe*'s central holding, *Casey* reiterated the "settled" principle that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, * * * as well as bodily integrity." 505 U.S. at 849. The Court emphasized that a long line of precedent "affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id.* at 851. And the Court explained that *Roe* "invoked the reasoning and the tradition of the[se] precedents." *Id.* at 853; see *id.* at 857-858. *Casey* thus carefully considered *Roe*'s reasoning and its grounding in precedent.

Ultimately, however, the *Casey* Court did not determine whether it would have decided *Roe* the same way had it been writing on a blank slate. Instead, the Court

held that whatever the views of the current Justices, principles of *stare decisis* made it "imperative to adhere to the essence of *Roe*'s original decision." 505 U.S. at 869. Applying traditional *stare decisis* factors, the Court explained that *Roe*'s core holding that States may not prohibit abortion before viability had proved workable; that it had not been overtaken by any subsequent legal or factual developments; and that it had engendered profound reliance by "[a]n entire generation" that had "come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society and to make reproductive decisions." *Id.* at 860; see *id.* at 855-861; see also *id.* at 870 (plurality opinion).

Given that context, the Court concluded that it "could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently." *Casey*, 505 U.S. at 864. And the Court emphasized that overruling a "watershed" decision like *Roe* on that basis would have caused "profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Id.* at 867, 869.

B. *Stare Decisis* Requires Adherence To *Roe* And *Casey*

The principles of *stare decisis* that dictated the outcome in *Casey* apply with even greater force here.

Stare decisis is a fundamental feature of our constitutional system that was already "an established rule" at the Framing. *June Medical Servs. L. L. C.* v. *Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment) (citation omitted). Blackstone, for example, explained that *stare decisis* ensures that "the scale of justice" does not "waver with every new judge's opinion." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (quoting

1 William Blackstone, *Commentaries on the Laws of England* 69 (1765)). The Framers thus "understood that the doctrine of *stare decisis* is part of the 'judicial Power' and rooted in Article III of the Constitution." *Ibid.*

"Time and time again," therefore, this Court has emphasized the doctrine's "'fundamental importance to the rule of law.'" *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (citation omitted). *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). It "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986).

Stare decisis is not, of course, an "inexorable command." *Casey*, 505 U.S. at 854. But "for precedent to mean anything, [*stare decisis*] must give way only to a rationale that goes beyond whether the [prior] case was decided correctly." *June Medical*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment). "[A]n argument that [the Court] got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015).

Stare decisis carries added force in this case: The Court has already conducted a full *stare decisis* analysis in *Casey*, which considered and rejected the arguments petitioners press here. That holding in *Casey* is itself entitled to precedential weight. Petitioners offer no persuasive basis to overturn *Casey*'s application of *stare decisis* principles—much less one that is sufficiently

compelling to overcome the combined weight of *Roe*, *Casey*, and the many other precedents applying and reaffirming their core holding. To the contrary, each aspect of *Casey*'s analysis remains at least equally sound now.

1. The viability rule has remained clear and workable

Casey explained that viability provides a "simple limitation beyond which a state law is unenforceable," which had "in no sense proven 'unworkable.'" 505 U.S. at 855 (citation omitted); see *id.* at 870 (plurality opinion). That remains true today. For decades, lower courts have had no difficulty applying the viability rule. The Fifth Circuit's decision in this case, for example, accords with the decisions of every other court of appeals to consider a similar pre-viability ban on abortion. Pet. App. 8a; *id.* at 22a (Ho, J., concurring in the judgment).

Petitioners do not seriously dispute that viability is an eminently workable rule. Instead, their workability argument (Br. 19-22) focuses exclusively on the undue-burden standard that applies to *regulations*, rather than *prohibitions*, on pre-viability abortion. But because the Act is a prohibition, Pet. App. 11a-13a, the undue-burden standard is not at issue here. Even if petitioners' criticisms of that standard had merit, they would provide no basis for revisiting the viability line.

In any event, petitioners' attacks on the undue-burden standard are misplaced. That standard is "straightforward: placing a substantial obstacle in the path of a woman seeking a pre-viability abortion cannot be the means of accomplishing another legitimate state interest, nor can it be the real purpose of a state action." *Whole Woman's Health Alliance* v. *Hill*, 937 F.3d 864, 876 (7th Cir. 2019), cert. denied, 141 S. Ct. 189 (2020).

The standard's "focus[] on the existence of a substantial obstacle" is "the sort of inquiry familiar to judges across a variety of contexts." *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment); see *Casey*, 505 U.S. at 855. And although petitioners note (Br. 19-20) that Members of this Court have occasionally disagreed about the nuances of the standard or its application in particular circumstances, the same could be said about many other well-established rules of constitutional law.

2. Subsequent legal developments have reinforced the central holding of **Roe** *and* **Casey**

A party seeking to overrule precedent bears "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*, 474 U.S. at 266. Thirty years ago, the Court recognized that "no erosion of principle going to liberty or personal autonomy ha[d] left *Roe*'s central holding a doctrinal remnant." *Casey*, 505 U.S. at 860. That is even more true today.

a. In the decades since *Roe* and *Casey*, "constitutional developments" have only increased "the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child." *Casey*, 505 U.S. at 857. The Court has continued to embrace the constitutional right to make decisions about contraception and childrearing. See, *e.g.*, *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997). The Court has also specifically relied on *Casey* to hold that States may not criminalize homosexual conduct because the "right to liberty under the Due Process Clause" preserves "'a realm of personal liberty which the government may not

enter.'" *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) (citation omitted); see *id.* at 573-574. And the Court has invoked the same line of precedents in holding that the Constitution protects same-sex marriage: "Like choices concerning contraception, family relationships, procreation, and childrearing," "decisions concerning marriage are among the most intimate that an individual can make," and thus "inherent in the concept of individual autonomy" protected by the Due Process Clause. *Obergefell* v. *Hodges*, 576 U.S. 644, 665-666 (2015).

Nor have any doctrinal developments undermined the Court's determination that viability is "the point at which the balance of interests tips." *Casey*, 505 U.S. at 861. This Court has repeatedly invoked the viability line, including as recently as last year. See, *e.g.*, *June Medical*, 140 S. Ct. at 2120 (plurality opinion); *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2320 (2016); *Gonzales*, 550 U.S. at 146; *Stenberg* v. *Carhart*, 530 U.S. 914, 921 (2000).[2] And as noted above, the lower courts have consistently applied that line as well.

b. Petitioners nonetheless contend that *Roe* and *Casey* are inconsistent with the "established method of substantive-due-process analysis" reflected in this Court's decision in *Glucksberg*. Br. 28 (quoting *Glucksberg*, 521 U.S. at 720). Petitioners are correct that *Glucksberg* "insist[ed] that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices." *Obergefell*, 576 U.S. at 671. But the Court has more recently clarified that although *Glucksberg*'s

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[2] Contrary to petitioners' suggestion (Br. 44), *Gonzales* did not blur the viability line. "Alternatives" to the prohibited procedure were "available" throughout the pre-viability period. *Gonzales*, 550 U.S. at 164; see *id.* at 164-165.

approach "may have been appropriate" in the context of that case, "it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy." *Ibid.*; see, *e.g.*, *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 684-685 (1977); *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965).

The right recognized in *Roe* and *Casey* falls squarely in that category. Indeed, *Glucksberg* itself recognized as much. It repeatedly cited *Casey* with approval. See *Glucksberg*, 521 U.S. at 710, 720, 727-728 & n.19. And it listed the right to "abortion" alongside the rights "to marry," "to use contraception," "to have children," and "to bodily integrity" as among those recognized in "a long line of cases" interpreting the Due Process Clause. *Id.* at 720. The decision in *Glucksberg* thus did nothing to diminish *Roe* and *Casey*'s doctrinal underpinnings.

3. *No subsequent factual developments have undermined the central holding of* **Roe** *and* **Casey**

Casey held that factual developments since 1973 had "no bearing on the validity of *Roe*'s central holding." 505 U.S. at 860. The same is true today.

a. *Roe* and *Casey* explained that the physical and emotional effects of pregnancy, childbirth, and motherhood support a woman's liberty interest in deciding whether to terminate a pregnancy. *Roe*, 410 U.S. at 153; see *Casey*, 505 U.S. at 851-852. In *Roe*, the Court observed that the mortality rate for "early abortions" was roughly equivalent to that for childbirth. *Roe*, 410 U.S. at 149. Today, the risks of abortion are a tiny fraction of those of carrying a pregnancy to term. See, *e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2315 ("Nationwide, childbirth is 14 times more likely than abortion to result in death."). Although the risks of abortion increase as pregnancy progresses, pre-viability abortion

remains extremely safe.[3] And while many women choose to bear the risks and burdens of pregnancy, those risks and burdens confirm that a pregnant woman's potential "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role." *Casey*, 505 U.S. at 852.

Nor do factual developments detract from the viability line. Viability itself has remained static, at 23 to 24 weeks' gestation. Compare *Casey*, 505 U.S. at 860, with Pet. App. 44a. And as *Casey* explained, changes in the timing of viability would "have no bearing on the validity of *Roe*'s central holding": "Whenever it may occur," viability is "the critical fact," because it "marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." 505 U.S. at 860.

b. Petitioners point to three areas where they contend factual developments have overtaken *Roe* and *Casey*. Br. 29-31, 35. None supports overturning those decisions.

First, petitioners invoke (Br. 29) "modern options regarding and views about childbearing." It is certainly true that many American women have "pursue[d] both career success and a rich family life," *ibid.*, but that success has been achieved against the backdrop of *Roe*'s

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[3] Compare Suzanne Zane et al., *Abortion-Related Mortality in the United States: 1998-2010*, 126 Obstetrics & Gynecology 258, 260 tbl. 2 (Aug. 2015) (abortion mortality rate of 2.5 deaths per 100,000 abortions at 14-17 weeks' gestation and 6.7 deaths per 100,000 abortions after 18 weeks' gestation), with Emily E. Peterson et al., Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Racial/Ethnic Disparities in Pregnancy-Related Deaths—U.S., 2007-2016*, 68 Morbidity and Mortality Weekly Report No. 35, 762, 762 (Sept. 6, 2019) (overall pregnancy mortality ratio of 16.7 deaths per 100,000 live births). See Resp. Br. 27-29.

basic protections, and it has not been shared equally among women of different demographic, economic, and educational backgrounds. And pregnancy, childbirth, and motherhood continue to affect a woman's social, economic, and personal trajectory. See, *e.g.*, Danielle H. Sandler & Nichole Szembrot, U.S. Census Bureau, *Cost of Motherhood on Women's Employment and Earnings: New Mothers Experience Temporary Drop in Earnings* (June 16, 2020) (noting that women's workforce participation decreases following each birth; women who have children do not on average "return * * * to their pre-birth earnings path"; and "[b]oth employment and earnings" vary by mothers' "demographic characteristic[s]"); see generally Resp. Br. 35.

The policy advances petitioners cite (Br. 29, 35)—for example, safe-haven laws and the child-and-dependent-care tax credit—have not materially undermined this Court's previous assessment of the economic and social consequences of pregnancy. When *Roe* and *Casey* were decided, well-established "procedures and institutions" already existed "to allow adoption of unwanted children," and "a certain degree of state assistance" was available if a woman chose to carry a pregnancy to term and "raise the child herself." *Casey*, 505 U.S. at 872 (plurality opinion).

Second, petitioners assert (Br. 29) that access to contraceptives has increased, while "failure rates for all major contraceptive categories have declined." But advances in contraceptive access are not universal. And in cases of relationship abuse, rape, or incest—for which the Act provides no exception—the use of contraception may be outside the woman's control. In addition, birth control failure rates remain high. Between 2006 and 2010, the failure rate "for the five most commonly used

reversible birth control methods in the United States" was ten percent, meaning that one in ten women will experience an unintended pregnancy within the first year of contraceptive use. Aparna Sundaram et al., *Contraceptive Failure in the United States: Estimates from the 2006-2010 National Survey of Family Growth*, 49 Persp. on Sexual & Reprod. Health 7, 9, 13 (Mar. 2017). Indeed, in 2001, nearly half of women experiencing an unintended pregnancy had used contraception in the prior month. *Id.* at 7. Moreover, the accessibility and efficacy of contraception are irrelevant when a woman decides to seek an abortion because of changes to her medical, economic, or family circumstances after conception.

Third, petitioners assert (Br. 30) that "advances in medicine and science have eroded the assumptions" of *Roe* and *Casey*. But petitioners' statements that the fetus is a "living organism" and has "taken on the 'human form'" by 12 weeks' gestation, Br. 30-31 (citation omitted), mirror assertions the State made in *Roe*, see Appellee Br. at 29-54, *Roe*, *supra* (No. 70-18); see also Resp. Br. 31-32. *Roe* and *Casey* took those considerations into account by recognizing the State's legitimate interest in protecting fetal life, whenever "life" is understood to begin. *Casey* 505 U.S. at 871-876 (plurality opinion); *Roe*, 410 U.S. at 150.

Petitioners also briefly assert that knowledge regarding fetal pain has increased since those decisions, such that "advances in medicine and science have eroded the assumptions of 30—and 50—years ago." Pet. Br. 30; see *id.* at 42. But petitioners' account is inconsistent with medical evidence. See Resp. Br. 32-33. And in any event, the viability rule and undue-burden standard account for any developments in this area.

The State may regulate abortion to further its legitimate interests in all aspects of fetal life, so long as those regulations do not create a "substantial obstacle" to the woman's "right to make the ultimate decision" whether to terminate a pre-viability pregnancy. *Casey*, 505 U.S. at 877 (plurality opinion).

4. Reliance interests powerfully support adhering to **Roe** *and* **Casey**

In *Casey*, the Court observed that "for two decades," Americans had "organized intimate relationships and made choices that define their views of themselves and their places in society" in reliance on *Roe*'s basic holding. 505 U.S. at 856; see *id.* at 860. Over the ensuing thirty years, that reliance has further solidified. For half a century, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control" the timing and number of children they bear. *Id.* at 856. Indeed, *all* women now of childbearing age (and presumably most of their partners) have grown up against the backdrop of *Roe* and *Casey*'s core holding.

Overruling *Roe* and *Casey* at this late date would be a profound disruption. Such a holding would harm women (and their partners) who have "organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." *Casey*, 505 U.S. at 856. And it would seriously undermine women's "autonomy to determine [their] life's course, and thus to enjoy equal citizenship stature." *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting). Moreover, if States are permitted to ban pre-viability abortion, the effects are likely to be felt most acutely by young women, women of color, and

those of lesser means, further diminishing their opportunities to participate fully and equally in the Nation's social and economic life. See Resp. Br. 37-40.

Petitioners assert (Br. 32) that any reliance on *Roe* and *Casey* is unreasonable because some abortion decisions have been "fractured." But the Court has never endorsed the destabilizing suggestion that dissents—even vigorous dissents—make reliance on its precedents unreasonable. To the contrary, the decision on which petitioners principally rely rejected claims of reliance grounded in contracts signed or extended after *the Court* had expressly questioned the relevant precedent. *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2484-2485 (2018).

This case is entirely different: It involves broad social reliance on the continued existence of a deeply personal right that has for nearly fifty years been the "square, unabandoned holding of the Supreme Court." *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring in part and concurring in the judgment), overruled by *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018). The widespread reliance on that holding is, by definition, "justifiable." *Ibid.* And a decision eliminating the long-recognized, profoundly personal right to decide whether to carry a pregnancy to term would cause great disruption.

5. Overturning **Roe** *and* **Casey** *would cause grave harm*

a. In *Casey*, the Court emphasized the "terrible price [that] would be paid for overruling" *Roe*. 505 U.S. at 864. "Overruling precedent is never a small matter." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2422 (2019) (citation omitted). But as *Casey* explained, particular care is required before reconsidering *Roe* and other decisions of "comparable dimension" that address "intensely divisive"

national "controvers[ies]." 505 U.S. at 861, 866; see *id.* at 863-864. The Court acknowledged that such a decision will prompt "inevitable efforts to overturn it and to thwart its implementation"—as *Roe* had already done, and as *Casey* itself would do. *Id.* at 867. And the Court concluded that given such efforts, overruling precedent "in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy." *Ibid.*

Nothing in the intervening decades has diminished the force of *Casey*'s warning about the costs of overruling *Roe*. To the contrary, those costs have only grown: Petitioners ask the Court to overrule not one but two "watershed" decisions, which have only become more deeply entrenched with time.

b. Petitioners assert (Br. 24) that *Roe* and *Casey* should be overruled because they have led to "heated, zero-sum disputes about abortion." But even before those decisions, abortion was an "emotional" subject on which people held "vigorous opposing views" and "deep and seemingly absolute convictions." *Roe*, 410 U.S. at 116; see *Casey*, 505 U.S. at 869. It strains credulity to suggest that reversing those decisions—eliminating a right on which millions of women rely while calling into question other precedents protecting the most intimate individual liberties—would create calm rather than further divisiveness, or end the "inevitable efforts to overturn" this Court's decisions, *Casey*, 505 U.S. at 867. And even if it would, the aim of "public peace" "cannot be accomplished by * * * deny[ing] rights created or protected by the federal Constitution." *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) (citation omitted).

Petitioners also err in contending (Br. 27) that *stare decisis* should yield because *Roe* and *Casey* sometimes

require courts to overturn state laws. As *Casey* recognized, "some disagreement is inevitable" when courts apply "any legal standard which must accommodate life's complexity." 505 U.S. at 878 (plurality opinion). And petitioners' argument is particularly misplaced in the context of the viability line. To the extent that line has required courts to overturn state laws, it is because those laws have defied the clear holding of *Roe* and *Casey* by prohibiting pre-viability abortion. As this Court has explained, however, "legislative acts" cannot "interfer[e] with [this Court's] duty 'to say what the law is.'" *Janus*, 138 S. Ct. at 2485 n.27 (citation omitted). And it would disregard *Casey*'s central lesson to allow States to bootstrap their legislatively expressed disagreement with this Court's precedents into a reason for overturning them. See *Casey*, 505 U.S. at 867.

C. *Roe* And *Casey* Were Correctly Decided

Because *stare decisis* requires affirmance, the Court need not determine whether it would have decided *Roe* or *Casey* in the same way if it were "addressing the issue in the first instance." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). But *Roe* and *Casey* were correct to recognize and reaffirm that States may not "prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879 (plurality opinion). At an absolute minimum, that holding is not so "grievously or egregiously wrong" as to overcome the powerful *stare decisis* principles counseling adherence to precedent. *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

1. This Court has long interpreted the "Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component" that protects certain liberty interests against government infringe-

ment, "no matter what process is provided." *Reno* v. *Flores*, 507 U.S. 292, 301-302 (1993); see, *e.g.*, *Obergefell*, 576 U.S. at 694-695 (Roberts, C.J., dissenting); *Whitney* v. *California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), overruled on other grounds by *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). That doctrine reflects that "some liberties are so rooted in the traditions and conscience of our people as to be ranked as fundamental," such that they cannot be denied without compelling justification. *Obergefell*, 576 U.S. at 694-695 (Roberts, C.J., dissenting) (citation and internal quotation marks omitted). *Roe* and *Casey* "stand[] at an intersection of two lines of decisions" recognizing such fundamental rights. *Casey*, 505 U.S. at 857. Regulations on abortion are thus "doubly deserving of scrutiny." *Id.* at 896.

First, this Court's decisions recognize a right to "bodily integrity." *Casey*, 505 U.S. at 857. At the Founding, a person's "uninterrupted enjoyment of his life, his limbs, his body, [and] his health," and "[t]he preservation of [his] health from such practices as may prejudice or annoy it," were considered to have been "vested in [him] by the immutable laws of nature"; "the principal aim of society" was to protect "individuals in the enjoyment of" these and other "absolute rights." 1 Blackstone 120, 125, 130. The "equal right of every citizen" to the "management" of "his person" thus was considered a "foundation of republican government." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816).

In line with those principles, and "[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, this Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process

Clause." *Cruzan* v. *Director, Mo. Dep't of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring). As the Court has explained, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." *Id.* at 269 (citation omitted); see, *e.g.*, *Union Pac. Ry. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891). While that liberty generally must be "balanc[ed] * * * against the relevant state interests," *Cruzan*, 497 U.S. at 279 (citation omitted); see, *e.g.*, *Jacobson* v. *Massachusetts*, 197 U.S. 11, 26 (1905), the Court has repeatedly recognized "limits on governmental power to mandate medical treatment or to bar its rejection," *Casey*, 505 U.S. at 857; see, *e.g.*, *Riggins* v. *Nevada*, 504 U.S. 127, 135-137 (1992); *Washington* v. *Harper*, 494 U.S. 210, 221-222, 229 (1990); *Rochin* v. *California*, 342 U.S. 165, 172-174 (1952).

Second, the Court has recognized a fundamental liberty interest in making "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 576 U.S. at 663. "Choices about marriage, family life, and the upbringing of children" have long "ranked as 'of basic importance in our society.'" *M. L. B.* v. *S. L. J.*, 519 U.S. 102, 116 (1996) (citation omitted); see, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." *Carey*, 431 U.S. at 685; see, *e.g.*, *Eisenstadt* v. *Baird*, 405 U.S. 438, 452-454 (1972); *Griswold*, 381 U.S. at 484-486; *Skinner* v. *State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The core holding of *Roe* and *Casey* follows naturally from these long-established principles. Compelling a woman to continue a pregnancy against her will is a

profound and lasting intrusion on her bodily integrity. See *Casey*, 505 U.S. at 852; *id.* at 927 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). The decision whether to carry a pregnancy to term also is "deep[ly] personal," *id.* at 853, and falls within the "private realm of family life which the State cannot enter," *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); see, *e.g.*, *Griswold*, 381 U.S. at 485. In addition, a woman's "right to control [her] reproductive [life]" is central to her ability to "participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856; see *Obergefell*, 576 U.S. at 672-673 (discussing the "profound" connection between the Due Process and Equal Protection Clauses); *Lawrence*, 539 U.S. at 575 (similar).

Roe and *Casey* thus correctly recognize a "constitutional liberty of the woman to have some freedom to terminate her pregnancy," *Casey*, 505 U.S. at 869 (plurality opinion), that is well-grounded in history and tradition. At a minimum, because that liberty is so closely related to bodily integrity, familial autonomy, and women's equal citizenship, *Roe* and *Casey*'s core holding that the Constitution protects some freedom to terminate a pregnancy cannot be *grievously* incorrect.

2. As *Roe* and *Casey* also correctly recognize, however, the woman's liberty is not the end of the analysis. States have "important interests," including "safeguarding health" and "protecting potential life." *Roe*, 410 U.S. at 154. Thus, determining whether a restriction on liberty rises to the level of constitutional violation requires "balancing [the individual's] liberty interests against the relevant state interests." *Cruzan*, 497 U.S. at 279 (citation omitted).

The viability line appropriately balances those interests. The line has both "logical and biological justifications." *Roe*, 410 U.S. at 163. Before viability, a fetus is not "capab[le] of meaningful life outside the * * * womb," *ibid.*; during that time, the woman's bodily integrity interests are at their apex, and "the State's interests are not strong enough to support a prohibition of abortion," *Casey*, 505 U.S. at 846. The viability line also affords women sufficient time to exercise their right to make intimate personal and familial decisions. *Id.* at 870 (plurality opinion). In addition, because States may regulate abortion prior to viability so long as the restrictions do not create an undue burden, *Casey* gives significant weight to the State's interests even in the early stages of pregnancy.

3. Petitioners assert (Br. 16) that the constitutional right to choose whether to terminate a pre-viability pregnancy lacks "grounding in text, structure, history, or tradition." The same arguments were forcefully presented in *Roe* and *Casey*. See *Casey*, 505 U.S. at 979-981 (Scalia, J., concurring in the judgment in part and dissenting in part); *Roe*, 410 U.S. at 173-177 (Rehnquist, J., dissenting). But the Court has long held that the "'liberty' specially protected by the Due Process Clause" is not limited to "the specific freedoms protected by the Bill of Rights" or other express constitutional text. *Glucksberg*, 521 U.S. at 720. And the Court has never accepted petitioners' view that the Clause reaches "only those practices" that were "protected against government interference by other rules of law when the Fourteenth Amendment was ratified." *Casey*, 505 U.S. at 847.

To reverse course and accept those limits today would not merely overturn *Roe* and *Casey*, but would

also threaten the Court's precedents holding that the Due Process Clause protects other rights, including the rights to same-sex intimacy and marriage, see *Obergefell*, 576 U.S. at 670-672; *Lawrence*, 539 U.S. at 567; to "interracial marriage," *Casey*, 505 U.S. at 848 (citing *Loving*, 388 U.S. at 12); and to use contraception, see *Carey*, 431 U.S. at 687 (citing *Griswold*, 381 U.S. at 485; *Eisenstadt*, 405 U.S. at 453). None of those practices is explicitly mentioned in the Constitution, and most of them were widely prohibited when the Fourteenth Amendment was adopted.

4. In any event, petitioners significantly understate the historical support for *Roe* and *Casey*. "There was agreement" at common law that in the early stages of pregnancy, "the fetus was to be regarded as part" of the woman. *Roe*, 410 U.S. at 134. Until the fetus had "advanced to that degree of maturity" that it could be "regarded in law" as having a "separate and independent existence," abortion was not prohibited. *Commonwealth* v. *Parker*, 50 Mass. (9 Met.) 263, 266, 268 (1845). At common law, the fetus was generally considered to have a legally "separate existence" after quickening—when the woman could feel its movement in utero. *Id.* at 267; see *Roe*, 410 U.S. at 132 (placing quickening at 16 to 18 weeks). It is "doubtful," however, that "abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." *Roe*, 410 U.S. at 136; see *id.* at 135-136 & n.26 (noting the "paucity of common-law prosecutions for post-quickening abortion," and observing that most of the authority suggesting that post-quickening abortion was unlawful was dicta).

Until the mid-19th century, "the law in effect in all but a few States * * * was the pre-existing English

common law." *Roe*, 410 U.S. at 138. Thus, as petitioners do not contest, at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages. See James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, at 3 (1978); R. Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 Population Studies 53, 54-55 (1974).[4]

States gradually began to depart from the common law as the 19th century progressed. But as late as 1840, pre-quickening abortion remained legal in at least 21 of 26 States: 16 States had no abortion statutes, and thus relied on the common law; 5 of the 10 States with statutes made abortion a crime only after quickening. Mohr 43. To the extent the remaining statutes would have been interpreted to criminalize pre-quickening abortion, they were "essentially unenforced and unenforceable" in that period, given the difficulty in proving pregnancy or the intent to terminate it. *Ibid.*

In the years that followed, many States adopted or amended abortion restrictions. *Roe*, 410 U.S. at 139. But as explained above, this Court's interpretation of the Due Process Clause has never been controlled by the state of the law when the Fourteenth Amendment was adopted. And it would be particularly inappropriate to treat the laws of the late 1800s as controlling on

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[4] Insofar as the common law rule turned on quickening, it did not precisely track the viability line. See *Roe*, 410 U.S. at 132. But the historical use of quickening as a dividing line demonstrates that abortion generally was available early in pregnancy, and that it was often legal at least before a fetus could be considered legally separate from the pregnant woman. See *Parker*, 50 Mass. (9 Met.) at 267. The viability line faithfully translates the common law's concern with separateness into an externally verifiable and legally workable rule.

the subject of abortion, a matter that uniquely affects women: In most States, women could not even vote for the legislators who enacted those laws.

5. Finally, petitioners err in asserting (Br. 39, 44) that "[e]ven if the 'liberty' secured by the Due Process Clause did protect some right to abortion," the viability line "is baseless" or "arbitrary." *Roe* articulated that line "with great care," and *Casey* reaffirmed that viability represents the point at which a fetus becomes sufficiently legally separate from a pregnant woman to justify a determination that the State's legitimate interests outweigh the woman's interests in making the decision whether to carry a pregnancy to term. *Casey*, 505 U.S. at 870 (plurality opinion).

Petitioners find that line "[un]persuasive" (Br. 40) only because they discount the woman's interests. When those interests are considered, viability reasonably "reconcile[s] * * * the liberty of the woman" and the State's regulatory interests. *Casey*, 505 U.S. at 873 (plurality opinion). And petitioners cannot demonstrate that the viability line is wrong—much less that it should be overruled—without identifying an alternative that reflects the significance of the interests on both sides of the balance. Cf. *Fulton* v. *Philadelphia*, 141 S. Ct. 1868, 1882-1883 (2021) (Barrett, J., concurring) (noting that in deciding whether to overrule a precedent, the Court must consider "what should replace [it]"). Petitioners' inability to do so confirms the soundness of the line this Court has drawn for nearly half a century.

D. Petitioners' Alternative Arguments Lack Merit

Petitioners devote most of their brief to urging the Court to repudiate all constitutional protection for abortion. In their view, a woman's interest in deciding for herself whether to carry a pregnancy to term merits no

greater constitutional protection than social and economic rights that trigger rational-basis review. But petitioners also briefly assert (Br. 45-49) that if this Court "is not prepared to reject heightened scrutiny" altogether, it should uphold the Act on one of two purportedly more modest "alternative[]" grounds.

That modesty is illusory. Both of petitioners' alternatives would still require the Court reject the viability rule, which is "the most central principle" of *Roe* and *Casey*. *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) (quoting *Casey*, 505 U.S. at 871 (plurality opinion)). Taking that step would carry all of the *stare decisis* harms identified in *Casey*. And petitioners' terse discussion of alternatives does not even begin to offer a workable framework for addressing the avalanche of questions that would immediately follow from such a holding.

1. Petitioners first suggest (Br. 46) that this Court could "hold that the Act satisfies any standard of constitutional scrutiny," including "strict scrutiny." Such a holding, however, could not be reached without distorting strict scrutiny beyond recognition. While the State identifies interests "in protecting unborn life, women's health, and the medical profession's integrity," *ibid.*, the Act does not protect them in a narrowly tailored way. Rather, it bans abortion months before a fetus is capable of meaningful life outside the womb; at a time when abortion is far safer than pregnancy and childbirth; and without distinguishing between methods that might have different effects on the "integrity" of the medical profession. The Act also lacks exceptions for rape, incest, or serious fetal anomalies that are not "incompatible with life outside the womb," Miss. Code Ann. § 41-41-191(3)(h); see *id.* § 41-41-191(4).

Like petitioners' primary request to apply rational-basis review, upholding the Act's 15-week ban as consistent with "any standard of constitutional scrutiny," Pet. Br. 46, would "invite 'perpetua[l] give-it-a-try'" legislation. *Janus*, 138 S. Ct. at 2481 (citation omitted; brackets in original). If this Court were to hold that the State's interests are compelling at 15 weeks, and that the ban is narrowly tailored to serve those interests, States would assert the same interests to attempt to justify bans at 12 weeks, see, *e.g.*, *Edwards* v. *Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (per curiam), cert. denied, 577 U.S. 1102 (2016); 8 weeks, see, *e.g.*, *Reproductive Health Servs. of Planned Parenthood of the St. Louis Region, Inc.* v. *Parson*, 1 F.4th 552 (8th Cir. 2021), vacated, reh'g en banc granted (July 13, 2021), petition for cert. pending, No. 21-3 (filed June 30, 2021); or 5 to 6 weeks—before many women even know they are pregnant, see, *e.g.*, *Jackson Women's Health Org.* v. *Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam). Petitioners do not suggest how the Court could draw a principled line between such laws. Indeed, petitioners conspicuously fail to identify *any* alternative line short of permitting complete bans on abortion.

2. Petitioners also suggest (Br. 46) that the Court could hold that "the Act does not impose an undue burden." But the undue-burden standard does not "disturb the central holding of *Roe*," that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879 (plurality opinion). Because the Act prohibits pre-viability abortion, the undue-burden standard is inapplicable.

Even if the undue-burden standard applied, it would require affirmance. Petitioners observe (Br. 47-48) that

most women who terminate pregnancies in Mississippi do so before 15 weeks' gestation. But because "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects"—rather than those for whom it is "irrelevant," *Casey*, 505 U.S. at 894—the undue-burden analysis, if applicable, would focus on women who seek abortions after 15 weeks but before viability. See *id.* at 895-895; see also, *e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2320. As to them, the Act's ban is plainly "a substantial" and unconstitutional "obstacle" to exercising the right to terminate a pre-viability pregnancy. *Casey*, 505 U.S. at 894-895; see, *e.g.*, *id.* at 894 (regulation imposed an undue burden where it would affect "one percent of women seeking abortions").

Adopting petitioners' alternative approach would thus both overturn *Roe*'s viability line and distort the undue-burden standard reflected in this Court's precedents. Even more fundamentally, it would plunge the Court into the same standardless exercise as petitioners' other alternative. Petitioners assert (Br. 47) that the Act's 15-week ban does not impose a substantial burden on a "significant" number of women—at least given the particular circumstances that currently prevail in Mississippi. But they do not explain how the Court should evaluate a 15-week ban in a State (or at a time) when more women seek abortions after that point. And they likewise provide no principled basis for deciding the constitutionality of the 12-, 10-, 8-, and 6-week bans that would inevitably follow.

3. For nearly fifty years, the viability rule adopted in *Roe* and reaffirmed in *Casey* has provided a clear and settled answer to those questions. Petitioners' inability to offer any workable alternative to that rule further

confirms the answer dictated by *stare decisis* and a proper construction of the Fourteenth Amendment: The Court should once again reaffirm that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846. Under that established rule, the decision below must be affirmed: The Act is indisputably a prohibition on pre-viability abortion. Pet. App. 2a.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2021